

IN THE COURT OF APPEALS FOR THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

No. 24,103

GILBERT TORRES, JR.,

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED

Defendant-Appellant.

MAY 17 2004

Patricia R. Wallace

APPELLANT'S REPLY BRIEF

APPEAL FROM THIRTEENTH JUDICIAL DISTRICT COURT
FOR VALENCIA COUNTY, NEW MEXICO

HONORABLE JOHN W. POPE, District Judge

No. D-1314-CR 2001-483

TODD HOTCHKISS
FRECHETTE & ASSOCIATES, P.C.
Attorneys for GILBERT TORRES, JR.
P.O. Box 26807
Albuquerque, New Mexico 87125
Tele. (505) 247-8558

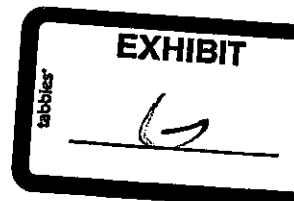


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ARGUMENT OF REPLY BRIEF

On May 12, 2004, this Court granted MR. TORRES' motion to extend time to May 17, 2004 to file this Reply Brief.

- I. Mr. TORRES' Counsel Failed to File a Motion to Suppress The Evidence Under the Fourth Amendment to the U.S. Constitution and Article II, § 10 of the New Mexico Constitution when State Agents Searched TORRES' Residence Without a Search Warrant.

No motion to suppress was filed by trial defense counsel. The record establishes that, prior to the acquisition of the search warrant at 8:00 a.m. on December 4, 2001, police officers conducted a multi-hour, detailed examination and evaluation of the physical evidence inside MR. TORRES' residence; questioned MR. TORRES at the police station based upon conclusions reached from their review of the physical evidence inside MR. TORRES' residence, arrested MR. TORRES for tampering with evidence and suspicion of murder, and Harris collected MR. TORRES' blood stained clothes and boots. (Brief-In-Chief¹ at 10, 12)

If this Court grants MR. TORRES' motion to supplement the record proper with the affidavit for search warrant and search warrant for MR. TORRES' residence, much of the affidavit for search warrant is based on the warrantless searches of MR. TORRES' residence prior to the acquisition of the search warrant.

¹Hereinafter cited to as BIC.

A. Plain Error Occurred.

MR. TORRES is uncertain as to what the State is arguing when it asserts that the failure of trial counsel to file a motion to suppress evidence is "not an evidentiary matter that arose at trial". (Answer Brief² at 4) Much of the evidence admitted at trial was discovered, examined and evaluated as a result of the searches of the residence before the search warrant was acquired.

Contrary to the AB at 4, the failure of trial counsel to file a motion to suppress affected the substantial rights of MR. TORRES because his attorney did not attempt to exclude evidence which was obtained in violation of MR. TORRES' constitutional rights.

The State made no effort to argue that the line of cases from the United States Supreme Court in the last 25 years establishing and reaffirming that there is no "murder scene exception" to Warrant Clause of the Fourth Amendment. Flippo v. West Virginia, 528 U.S. 11, 120 S.Ct. 7 (1999); Thompson v. Louisiana, 469 U.S. 17, 105 S.Ct. 409, *reh'g denied*, (1984); Mincey v. Arizona, 437 U.S. 385, 98 S.Ct. 2408 (1978). (BIC at 23-24)

The call by TORRES to the police due to the apparent suicide by his ex-wife in his residence did not "evidence a diminished expectation of privacy" on his part or constitute consent for police to search TORRES' residence after TORRES was removed from the residence. Thompson v. Louisiana, 469 U.S. 17, 22-23, 105 S.Ct.

²Hereinafter cited to as AB.

409, 411-12, reh'g denied, (1984); Mincey v. Arizona, 437 U.S. at 391-92, 98 S.Ct. at 2412-13.

While the State baldly asserts that TORRES consented to the warrantless searches of his residence on December 3-4 before acquisition of the search warrant, there was no specific factual basis for any conclusion by a court that TORRES specifically, clearly and unequivocally consented. (AB at 6)

MR. TORRES' trial counsel's statement that there were no relevant matters concerning the consent is not the factual basis in support of unquestionable consent. Instead, trial defense counsel's comments about his lack of interest in any possible issue concerning the unconstitutional acquisition of the evidence only highlight how unreasonable he was to not file a motion to suppress.

If MR. TORRES' alleged consent had been determined by the trial court prior to trial, then the reasonable strategy at trial was to argue that the MR. TORRES' consent was voluntary. If the trial court determined prior trial that MR. TORRES did not consent, then evidence would have been determined to have been inadmissible.

Plain error occurred when trial counsel failed to protect MR. TORRES' constitutional rights under the Fourth and Sixth Amendments and Article II, §§ 10 and 14 of the New Mexico Constitution.

**B. Trial Counsel Provided Ineffective Assistance of Counsel
When No Plausible, Rational or Reasonable Strategy
Existed for the Failure of Trial Counsel to Move for the
Suppression of the Evidence.**

The State argued that MR. TORRES' trial counsel "was aware of,

but chose not to pursue the issue" of the propriety of the warrantless searches of his residence on December 3-4, trial counsel's decision was "strategic" or within "the realm of competency", the record does not support a prima facie case of ineffective assistance of counsel, the case was not appropriate for remand for an evidentiary hearing in the trial court, and MR. TORRES has post-conviction proceedings he could engage in on that issue under Rule 5-802, N.M.R.A. 2004. (AB at 6-8)

Contrary to the State's AB at 7, a prima facie case of ineffective assistance of counsel exists as a plausible, rational strategy or tactic cannot explain the trial counsel's failure, and MR. TORRES was prejudiced. Patterson v. LeMaster, 2001-NMSC-013, ¶17, 130 N.M. 179, 21 P.3d 1032; State v. Cooper, 1998-NMCA-180, ¶11, 126 N.M. 500, 972 P.2d 1, cert. denied, (1998).

U.S. Supreme Court precedent from Mincey to Flippo mandated there is no "crime scene exception" to the warrant requirement. Contra State v. Cooper, 1998-NMCA-180, ¶¶21-22.

"There was no strategic reason for a reasonably competent attorney who was aware of the facts of this case and the governing case law not to try to suppress" the evidence gained as a result of the warrantless searches of TORRES' residence. Patterson v. LeMaster, 2001-NMSC-013, ¶27. There is no plausible, strategic reason not to seek exclusion of the fruit of the unconstitutional, warrantless searches of MR. TORRES' residence.

TORRES was prejudiced because there was no apparent indication that TORRES was disposed to plea the case out, the strength of the proper and admissible evidence was not great (MR. TORRES was acquitted of first-degree murder), and the motion to suppress "was crucial because it could have excluded key evidence". Patterson v. LeMaster, 2001-NMSC-013, ¶¶28-33. The confidence in the jury's verdict is consequently undermined. Id.

Contrary to the State's AB at 7, this Court should find that TORRES has established a *prima facie* showing of ineffective assistance of counsel, reverse the convictions of TORRES, or remand the matter for an evidentiary hearing. See State v. Richardson, 114 N.M. 725, 845 P.2d 819 (Ct. App.), cert. denied, (1992). Trial counsel's failure was an egregious error and could not conceivably have been the product of a reasonable strategic decision.

II. Evidentiary Issues Created Error.

A. The Trial Court Erred and Prejudiced TORRES When Overruling TORRES' Objection Regarding the Scope of Opinion Testimony by the State's Proffered Expert as Blood Stain Pattern Analysis and Accident Reconstruction, Specifically Agent Ortiz, Beyond His Qualified Opinion that Pace Did Not Commit Suicide and Detailing How He Believed the Entire Murder Circumstances Occurred.

The State argued in its AB at 14-19, that Ortiz's statements that "physical evidence does not lie" and "all the physical evidence points to this was a deliberate killing" were based "upon physical facts and observations", that MR. TORRES' reliance on

State v. Lucero, 116 N.M. 450, 863 P.2d 1071 (1993) is "misplaced", that this "case is controlled by State v. Landgraf, 121 N.M. 445, 913 P.2d 252 (Ct. App. 1996)", and if any error occurred it was harmless error.

Contrary to the AB at 14, Ortiz was accepted as an expert at trial in blood stain pattern analysis and accident reconstruction, not a "crime reconstructionist expert". Under this erroneous pretense, Ortiz gave the jury "a detailed synopsis" of how he "believed the crime occurred". (AB at 16)

The "physical evidence does not lie," testified Ortiz, "and all the physical evidence points to this was a deliberate killing." (BIC at 19) Obviously, physical evidence cannot and does not speak; instead, Ortiz interpreted the meaning of the physical evidence for the jury instead of presenting the facts to the jury so it could derive its meaning. Ortiz's testimony that the "physical evidence does not lie" consequently was an expert's improper validation of the State's case. State v. Lucero, 116 N.M. at 454, 863 P.2d at 1075.

The State argued that State v. Landgraf, 1996-NMCA-024, 121 N.M. 445, 913 P.2d 252, *cert. denied*, 121 N.M. 375, 911 P.2d 883 controls this case. (AB at 18-19) Landgraf, 1996-NMCA-024, ¶20, did not involve any comments by the expert witnesses vouching for themselves or the State's theory that the "physical evidence does not lie". Landgraf, 1996-NMCA-024, ¶20, is not controlling and

does not even address the fundamental statements made by the State's expert witness in this case, vouching for his and the State's theory outside of the expert's accepted expertise.

Ortiz even speculated outside the scope of physical evidence by asserting TORRES went into the bedroom with the shotgun "maybe with the intent to kill her at that point in time." (BIC at 18)

Ortiz's testimony was the prosecutor's closing argument rather than providing a scientific foundation for the prosecutor's closing argument. Contra State v. Vigil, 103 N.M. 643, 711 P.2d 920 (1985); Duran v. Lovato, 99 N.M. 242, 656 P.2d 905 (Ct. App. 1982).

Ortiz also improperly commented directly on the credibility of TORRES. State v. Lucero, 116 N.M. 450, 454, 863 P.2d 1071, 1075 (1993). Ortiz's testimony could not be offered to establish that the State's witnesses were telling the truth by alleging TORRES murdered Pace. State v. Lucero, 116 N.M. at 454, 863 P.2d at 1075. Ortiz vouched for the credibility of the State's case against TORRES and encroached into the province of the jury to determine the truthfulness of the evidence and testimony. State v. Lucero, 116 N.M. at 454, 863 P.2d at 1075. Ortiz provided "no scientifically valid or reliable means by which to determine whether a particular event has in fact happened." State v. Lucero, 116 N.M. at 454, 863 P.2d at 1075.

Also contrary to the AB at 19, Dr. Nine did not make any statements vouching for his and the State's theory.

The error by Ortiz was not harmless. The State's AB made the same inaccurate assumption as the prosecutor's closing argument: "It should be an easy verdict." (T.03-107, 64-67) The reality is that the jury acquitted MR. TORRES of first-degree murder.

Consequently, TORRES' substantial rights to a fair trial and a jury trial under the Sixth Amendment to the U.S. Constitution and Article II, § 14 of the New Mexico Constitution were violated.

B. The Trial Court Erred by Overruling TORRES' Objection to the Hearsay Testimony of Pace From October 14, 2001, and Argued by the State as State Of Mind Evidence Under Rule 11-803(C), N.M.R.A. 2003 Or Relevant to TORRES' Anticipated Self Defense Claim that "The next time you guys see me you're going to find me dead"?

The statement at issue was made by Pace on October 14, 2001 to a police officer who responded to TORRES' domestic violence call for police assistance on that date. Pace appeared "groggy", under the influence of something, and Pace had been drinking. (BIC at 4) That statement from October 14, 2001 was admitted concerning Ms. Pace's possible state of mind on December 3, 2001. There was no evidence admitted concerning the time in between those dates.

The State began its closing argument with, "Pamela Pace's prophesy came true; 'The next time you see me you are going to find me dead.' She told Officer Josh Perea of the Los Lunas Police Department. And sure enough, the next time Josh Perea saw Pamela Pace, he saw her dead." (BIC at 21)

The State recognized that the new case of Crawford v.

Washington, ___ U.S. ___, 124 S.Ct. 1354 (2004) is the new first hurdle that the State must clear. (AB at 9-10) The State facially argued that Ms. Pace's hearsay testimony through Officer Perea was "clearly non-testimonial", without citation to any law as authority, and was "not the type of testimonial statement envisioned by the majority in Crawford.". (AB at 10)

The U.S. Supreme Court in Crawford reversed the defendant's murder conviction by holding that a woman's hearsay testimony at trial, admitted as a statement against penal interest, was inadmissible as a denial of the defendant's right Sixth Amendment rights to confront and cross examine the witness. Contrary to the State's assertions, Ms. Pace's hearsay statement to Perea is very analogous to the inadmissible statement to police in Crawford.

Because Ms. Pace's statement to Perea, to which Perea testified, is categorically testimony and therefore testimonial in nature, Crawford controls this case.

The State also argued that Ms. Pace's statement meets the requirements for a state of mind hearsay exception. (AB at 10-14)

The importance of the evidence at issue is shown by its priority placement in the prosecutor's closing argument. The State framed its closing argument by the evidence at issue. Contrary to the State's AB at 14, there is a reasonable probability that the victim's statement contributed to the conviction.

The State asserted that Ms. Pace's October 14 statement

"showed the victim's state of mind shortly before her death". (AB at 12) One page later in the AB at 13, the State recognized the statement was made "two months before her death". The State argued that "the state of mind of the victim of a crime is a fact in consequence where there are issues of self-defense, suicide, or accident." (AB at 11)

However, the facts of October 14 do not support the State's claim. MR. TORRES called the police on October 14 and Ms. Pace was being escorted away from MR. TORRES' residence. There was no evidence that Ms. Pace was the victim of a crime on October 14, contrary to the State's AB at 11. There was no evidence on October 14 to support any notion that Ms. Pace was fearful of MR. TORRES, contrary to the State's AB at 11 and 12. Contrary to the States AB at 12, that hearsay testimony did not "tend[] to refute the assumption Ms. Pace was suicidal or that the Defendant acted in self-defense."

Contrary to the AB at 12, Ms. Pace's statement contained no express reference that MR. TORRES would kill her. Instead, she simply stated she expected to die in the future and Perea would see her dead. Because of the question of what Ms. Pace meant by her remark, the statement was improperly admitted under Rule 11-803(C).

The State also argued that the admission of Ms. Pace's October 14 statement was harmless error. (AB at 13-14) Contrary to the State's AB at 13, there is no "wealth of inculpatory evidence" and

there is substantial conflicting evidence to discredit the State's testimony as the jury, despite the improperly admitted evidence, acquitted MR. TORRES of first-degree murder.

MR. TORRES continues to request that this Court rely on the New Mexico Supreme Court precedent of State v. Baca, 120 N.M. 383, 389-90, 902 P.2d 65, 71-72 (1995), relying on United States v. Brown, 490 F.2d 758, 763 n.10 (D.C. Cir. 1973), under Rule 11-803(C) either because the statement was irrelevant as an attempt to demonstrate a fact of consequence other than the declarant's state of mind on December 3, or because it was unfairly prejudicial.

Furthermore, Perea's hearsay testimony of Pace's October 14 statements was not highly probative to prove context, and the probative value, if any, was substantially outweighed by the danger of unfair prejudice under Rules 11-403 and 11-404, N.M.R.A. 2003. State v. Wrighter, 1996-NMCA-077, ¶11, 122 N.M. 200, 922 P.2d 582.

For any and all of the foregoing reasons, the trial court erred in overruling TORRES' objection to the admission of Pace's October 14, 2001 statement and denied TORRES a fair trial under the Sixth Amendment to the U.S. Constitution or Article II, § 14 of the New Mexico Constitution.

III. Prosecutor's Statements and Arguments Created Error.

- A. Fundamental Error Occurred When the Prosecutor Stated, "Just as you have taken an oath and Have raised your hand to fairly and truthfully judge this case, on behalf of the People of the State of New Mexico, I promise you that Ms. Garcia and myself will conduct our case as fairly and as honestly and as truthfully as possible".

The State argued that MR. TORRES' reliance on State v. Baca, 120 N.M. 383, 902 P.2d 65 (1995) and State v. Diaz, 100 N.M. 210, 668 P.2d 326 (Ct. App. 1983) was "misplaced" and "clearly distinguishable in its facts" without proffering to this Court any contrary authority in support of its position.

The State argued in its AB at 21 that the prosecutor's references in State v. Diaz, 100 N.M. 210, 213, 668 P.2d 326, 329 (Ct. App. 1983) "to his authority were much more clear, pervasive and egregious than in this case." This Court in Diaz, 100 N.M. at 213-14 never held that Diaz was the bare minimum required for error. This Court instead found the remarks of the Diaz prosecutor erroneous as references to the authority of the prosecutor and inferred that the prosecutor would not have brought the case unless he personally believed in the defendant's guilt. (AB at 21) State v. Baca, 120 N.M. at 392, 902 P.2d at 74 and Diaz are not misplaced as precedent for reversal as bearing specifically on the issue.

The prosecutor's statements served to assert his personal opinion as to the justness of the cause, the guilt of MR. TORRES, and constituted an assertion by the prosecutor of his personal

vouching for the credibility of the State's case to the point of inferring that the truth was that MR. TORRES was guilty and, since the jury was sworn to seek the truth, it must find MR. TORRES guilty. MR. TORRES' reliance on Diaz is not misplaced. Contrary to the State's AB at 22, the prosecutor did in fact refer to his authority and imply that his authority created a justness of his cause. Contrary to the State's AB at 22, the "remark could [not] be read merely as an assurance that the State would not knowingly present false or perjured testimony.

B. The Trial Court Erred or Fundamental Error Occurred When the Trial Court Overruled TORRES' Objection to the Prosecutor's Rebuttal Closing Argument that TORRES "continues to disgrace and deface her memory. Shame on you, Gilbert Torres. And I hope you feel my rage. I hope that as a society" and that TORRES was Less Worthy of Constitutional Protection Than the Memory of Pace.

The State admitted in its AB at 23 that the prosecutor's remark that "he hopes Defendant 'feels his outrage' was improper as it implied the prosecutor's personal belief in Defendant's guilt". This is consistent with precedent of this Court. State v. Vallejos, 86 N.M. 39, 519 P.2d 135 (Ct. App. 1974); State v. Ferguson, 111 N.M. 191, 803 P.2d 676 (Ct. App.), *cert. denied*, (1990).

Nonetheless, the State argued that it was yet another isolated error, and "did not go so far" as the State's error in State v. Diaz, 100 N.M. at 214, 668 P.2d at 330. Contrary to the State's AB at 24, the prosecutor also inappropriately used abusive or

vituperative language against TORRES "which tends solely to prejudice him" and "had the effect of inflaming the jury." State v. Diaz, 100 N.M. at 214, 668 P.2d at 330.

The State in its AB at 24 asserted that it was merely responding to MR. TORRES disgracing and defacing Ms. Pace's memory as "a fair comment on the evidence." However, the State presented the evidence of MR. TORRES' statements, not the defense.

For any and all of the foregoing reasons, the closing argument by the prosecutor was sufficiently egregious to call the validity of the verdict into doubt, and error or fundamental error occurred.

IV. Cumulative Error Occurred Based on the Foregoing Errors.

The State argued, "Defendant has not identified any error at his trial and his trial was fair" and, consequently, "may not therefore rely on the cumulative error doctrine." (AB at 25)

Defense counsel failed to seek to suppress the physical evidence removed from MR. TORRES' residence as fruit of unconstitutional searches of his residence. The State improperly relied on the testimony of a "crime scene reconstruction" expert to tell the jury how the evidence fits together. The State improperly introduced into evidence the October 14, 2001 statement by Ms. Pace of what the State believed was her alleged fear of MR. TORRES on December 3. The prosecutor improperly vouched for its case and made vituperative, personal appraisals of MR. TORRES' guilt before the jury. The asserted to the jury that, "It should be an easy

verdict." The jury acquitted MR. TORRES of first-degree murder.

The cumulative impact of errors, including trial counsel's failure to file a motion to suppress evidence, evidentiary matters, and statements by the prosecutor to the jury cumulatively prejudiced the defendant's right to a fair trial. State v. Baca, 120 N.M. at 392, 902 P.2d at 74; State v. Diaz, *supra*; State v. Vallejos, *supra*.

CONCLUSION

WHEREFORE, the Appellant, GILBERT TORRES, JR., respectfully requests that this Court reverse the district court's convictions and sentence, and to remand this case for further proceedings. TORRES also requests such other and further relief as this Court deems just and proper.

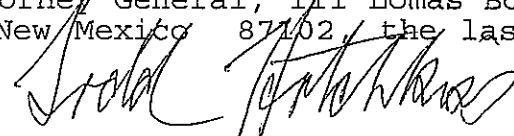
Respectfully submitted,



TODD HOTCHKISS
FRECHETTE & ASSOCIATES, P.C.
Attorney for GILBERT TORRES, JR.
P.O. Box 26807
Albuquerque, New Mexico 87125
Tele. (505) 247-8558

CERTIFICATE OF SERVICE

I, Todd Hotchkiss, hereby certify that on May 17, 2004 I placed a copy of the foregoing Reply Brief in the U.S. Mail, first-class postage paid, for mailing to opposing counsel Ms. M. Anne Kelly, Assistant New Mexico Attorney General, 111 Lomas Boulevard N.W., Suite 300, Albuquerque, New Mexico 87102, the last known address.



TODD HOTCHKISS

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

ORAL ARGUMENT CALENDAR

THURSDAY, JULY 8, 2004

3:00 p.m.

NO. 24103

STATE OF NEW MEXICO,
Plaintiff-Appellee,

Martha Anne Kelly
John J. Bogren

vs.

GILBERT TORRES,
Defendant-Appellant.

Todd Hotchkiss
Joseph M. Campbell

*PANEL: CHIEF JUDGE WECHSLER, JUDGES PICKARD AND VIGIL

*Court of Appeals' panel members are listed in seniority order.
Panels may be changed without notice.

Oral Argument will be held in the Court of Appeals courtroom,
Room 119, 237 Don Gaspar, Santa Fe, NM.

June 10, 2004

EXHIBIT

H

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

CLERK-7 PM 3:00

Opinion Number _____

COURT OF APPEALS
STATE OF NEW MEXICO
P.R. GALLAGHER, CLERK

Filing Date: 4/7/2005

Docket No. 24,103

STATE OF NEW MEXICO,

Plaintiff-Appellee,

vs.

GILBERT TORRES, JR.,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF VALENCIA COUNTY
John W. Pope, District Judge

Patricia A. Madrid
Attorney General
M. Anne Kelly
Assistant Attorney General
Albuquerque, NM

for Appellee

Todd Hotchkiss
Frechette & Associates, P.C.
Albuquerque, NM

for Appellant



O P I N I O N

WECHSLER, Judge.

(1) Defendant appeals his convictions for second degree murder and tampering with evidence. On appeal, Defendant argues that plain error occurred due to his trial counsel's failure to file a motion to suppress evidence because the police did not obtain a search warrant prior to collecting evidence from Defendant's home. In the alternative, Defendant argues that his counsel was ineffective in failing to file the motion. Additionally, Defendant argues that the trial court erred in allowing a witness to testify to a statement made by the victim over Defendant's hearsay objection, that it erroneously admitted testimony of two police officers, and that statements made by the prosecutor during opening statements and closing arguments constituted fundamental error. After the State filed its brief, Defendant filed a motion to supplement the record and to allow the State the opportunity to address the supplemental record in further briefing. We now deny the motion and affirm.

Factual and Procedural History

(2) On December 3, 2001, police officers responded to a possible suicide call at Defendant's home. Officer Dino Roden, one of the responding officers, testified that he could see inside through a glass storm door as he approached the home. He noticed debris and broken pottery on the floor and blood on the carpet. As Officer Roden was about to open the door, Defendant approached and stated "well she finally did it."

1 Officer Roden informed Defendant that he had been dispatched to
2 investigate a suicide and asked where "she" was. Defendant
3 informed the officer that the victim, Defendant's estranged
4 wife, was in the back bedroom.

5 (3) Officer Roden and Officer Joshua Perea, who arrived
6 shortly after Officer Roden, located the victim in the back
7 bedroom on the bed. She was dead with an apparent shotgun
8 wound to her chest. She had a four-to-five-inch gash on her
9 upper left thigh from which blood flowed up rather than down.
10 Her hands were badly lacerated, and her right thumb, which was
11 missing, was later found beneath a night stand. She had blood
12 stains on the bottom of one of her feet. There were also marks
13 on her throat and around the back side of her neck, as well as
14 evidence of retinal hemorrhaging. The officers saw a 12-gauge
15 shotgun leaning next to the victim. It had a badly damaged
16 barrel that "was peeled back like a banana." There was a
17 wooden backscratcher next to the shotgun. They also saw pieces
18 of shrapnel from the shotgun barrel on the wall in the bedroom
19 and pieces of duct tape and fibers of blue cloth attached to
20 the shotgun. There were shredded pieces of a potato on the
21 ceiling, the victim's body, and the shotgun.

22 (4) After making these observations, the officers cleared the
23 house, called New Mexico state police crime scene
24 investigators, and set up crime scene tape. Officer Perea
25 stated that Defendant did not appear upset at this point, and,

1 in fact, went outside and began drinking a beer.

2 (5) The officers questioned Defendant's neighbors. Witnesses
3 stated that they heard yelling coming from Defendant's
4 residence, followed by a loud noise, and that they observed a
5 man exit the residence and throw a bag over the fence into
6 another yard approximately ten minutes before the officers
7 arrived. Upon searching the area described by the witnesses,
8 the officers recovered a blue towel "covered with duct tape."
9 The officers also located a piece of duct tape underneath the
10 bed where the victim was found and a roll of duct tape in one
11 of the other rooms. The evidence indicated to the officers
12 that Defendant had strangled the victim, then used the duct
13 tape to attach the towel to the butt of the weapon and to
14 secure a potato to the end of the barrel, presumably as a
15 silencer. The evidence also indicated to police that Defendant
16 had staged the suicide scene.

17 (6) Dr. Jeff Nine, a forensic pathologist with the Office of
18 the Medical Investigator, found metal fragments, pieces of duct
19 tape, and potato fragments in the vicinity of the shotgun
20 wound. He testified at trial that the wounds on the victim's
21 hands indicated that her hands were in front of the barrel of
22 the weapon, but not necessarily grabbing it, as it was fired.
23 He concluded that the victim died from a shotgun wound to her
24 chest. However, he also stated that she had been beaten and
25 strangled prior to being shot, but he did not know if the

1 strangulation rendered her unconscious. When questioned
2 regarding the possibility of the victim having committed
3 suicide, Dr. Nine stated: "I don't believe there is any way
4 she could [have] done this [by] herself."

5 (7) Shortly after the police responded to the incident,
6 Defendant was transported to police headquarters for
7 questioning; he was not yet under formal arrest. Photographs
8 of Defendant, taken at the police station, showed bloodstains
9 on his clothing and a cut on his right hand. There was also
10 blood on Defendant's boot. While awaiting questioning,
11 Defendant stated, "I can't believe she did that." Defendant
12 waived his rights under Miranda v. Arizona, 384 U.S. 436, 479
13 (1966), and consented to giving a videotaped statement to
14 police. He stated that the victim had a long history of drug
15 abuse. He also stated that she had threatened to commit
16 suicide previously and that she had pointed the shotgun at
17 Defendant's friend on a prior occasion. When initially
18 questioned by police, Defendant reiterated his account that the
19 victim had committed suicide following an argument with
20 Defendant. However, when confronted with physical evidence
21 that was inconsistent with suicide, Defendant varied his story,
22 stating that he and the victim had struggled over the gun in
23 the bedroom and that it had accidentally discharged.

24 (8) At some point after the interview, the police obtained a
25 search warrant and "processed the scene." Defendant was

1 formally arrested, indicted, and charged with first degree
2 murder and tampering with evidence. After a jury trial,
3 Defendant was convicted of second degree murder and tampering
4 with evidence.

5 Plain Error

6 {9} Defendant argues that plain error occurred due to his
7 counsel's failure to file a motion to suppress evidence because
8 police officers searched his residence without a warrant. We
9 may take notice of plain errors affecting substantial rights
10 even though a defendant did not object to the errors at trial.
11 State v. Gutierrez, 2003-NMCA-077, ¶ 19, 133 N.M. 797, 70 P.3d
12 787. The plain error doctrine is not as strict as the doctrine
13 of fundamental error in its application. State v. Paiz, 1999-
14 NMCA-104, ¶ 28, 127 N.M. 776, 987 P.2d 1163. Therefore, "we
15 need not determine that there has been a miscarriage of justice
16 or a conviction in which the defendant's guilt is so doubtful
17 that it would shock the conscience of the court to allow it to
18 stand." State v. Lucero, 116 N.M. 450, 453, 863 P.2d 1071,
19 1074 (1993). Nevertheless, because the plain error rule is an
20 exception to the general rule that parties must raise timely
21 objection to improprieties at trial, plain error is to be used
22 sparingly. Paiz, 1999-NMCA-104, ¶ 28. The plain error rule
23 only applies to errors in evidentiary matters. Gutierrez,
24 2003-NMCA-077, ¶ 19. We apply the rule only if we have "grave
25 doubts about the validity of the verdict, due to an error that

1 infects the fairness or integrity of the judicial proceeding.”
2 Id.

3 {10} Defendant relies on the United States Supreme Court’s
4 holdings in Flippo v. West Virginia, 528 U.S. 11, 14 (1999)
5 (per curiam), and Mincey v. Arizona, 437 U.S. 385, 390 (1978),
6 in arguing that the officers’ failure to secure a search
7 warrant until December 4, 2001 and his counsel’s failure to
8 file a motion to suppress evidence affected his substantial
9 rights so as to cause plain error. As Defendant acknowledges,
10 Flippo dealt with the denial of the defendant’s motion to
11 suppress based on a “murder scene exception” to the Fourth
12 Amendment. Flippo, 528 U.S. at 12-14. The Court reversed the
13 lower court, and relying on Mincey, found that there was no
14 murder scene exception and that there were no exigent
15 circumstances present. Id. The defendants in Flippo and
16 Mincey did not argue that plain error occurred or that their
17 counsel was ineffective for failing to file a motion to
18 suppress, because counsel in both cases filed pretrial motions
19 to suppress. See Flippo, 528 U.S. at 12; Mincey, 437 U.S. at
20 389. Therefore, the Supreme Court did not have to perform the
21 completely different analysis necessary to determine whether
22 plain error occurred when the evidence was admitted by the
23 trial court.

24 {11} Because plain error does not occur in a vacuum, we
25 interpret Defendant’s argument to mean that the trial court

1 committed plain error in failing to suppress evidence sua
2 sponte. No New Mexico case has directly addressed this issue.
3 However, in analogous circumstances, the Tenth Circuit in
4 United States v. Meraz-Peru, 24 F.3d 1197 (10th Cir. 1994),
5 used an approach we consider persuasive. The defendant in
6 Meraz-Peru claimed that his conviction for possession of
7 marijuana should be reversed on appeal because he was stopped
8 without reasonable suspicion. Id. at 1198. He never filed a
9 motion to suppress the evidence at his trial, and the court
10 analyzed the issue for plain error. Id. In affirming the
11 defendant's conviction, it stated that "[a] reliable appellate
12 determination concerning the [merits of a motion to suppress]
13 is not possible in the absence of factual findings." Id. It
14 reasoned that when "the error defendant asserts on appeal
15 depends upon a factual finding the defendant neglected to ask
16 the district court to make, the error cannot be 'clear' or
17 'obvious' unless the desired factual finding is the only one
18 rationally supported by the record below." Id. (internal
19 quotation marks and citation omitted).

20 (12) Similarly, in this case, the factual finding that the
21 police unconstitutionally searched Defendant's home is not the
22 only one rationally supported by the record. On the contrary,
23 the facts in the record indicate that Defendant called the
24 police reporting the alleged suicide and that he may have
25 consented to their presence in his home. During his taped

1 statement to the police, Defendant stated "I called . . . first
2 and said [the victim] shot herself. . . . I called the police
3 and you were there." Agent Ortiz stated at trial that he was
4 suspicious and that he knew they were "going to need a search
5 warrant." During the cross-examination of Agent Ortiz,
6 Defendant's counsel stated: "But prior to that search warrant
7 [Defendant] had given consent to search his house, correct?"
8 Agent Ortiz responded in the affirmative. The record does not
9 otherwise give us an indication of the validity of the search
10 warrant. Therefore, because a finding that the police
11 illegally searched Defendant's home is not the only one
12 rationally supported by the record, there was no plain error.

13 Ineffective Assistance of Counsel

14 (13) Defendant additionally argues that his trial counsel was
15 ineffective because no reasonable strategy existed for his
16 counsel's failure to file a motion to suppress evidence. To
17 prevail on this argument, Defendant has the burden to establish
18 a prima facie claim of ineffective assistance. State v.
19 Roybal, 2002-NMSC-027, ¶ 19, 132 N.M. 657, 54 P.3d 61.
20 Defendant may only establish a prima facie claim by showing
21 that his counsel's performance fell below the performance of a
22 reasonably competent attorney and that his counsel's deficient
23 performance prejudiced Defendant. Patterson v. LeMaster, 2001-
24 NMSC-013, ¶ 17, 130 N.M. 179, 21 P.3d 1032. Within the context
25 of a failure to file a motion to suppress evidence, a defendant

1 must establish that the facts support the motion and that a
2 reasonably competent attorney could not have decided that the
3 motion was unwarranted. Id. ¶ 19. To determine whether the
4 facts support the motion, we evaluate the facts present in the
5 record. See Roybal, 2002-NMSC-027, ¶ 19 (stating that "[i]f
6 facts necessary to a full determination are not part of the
7 record, an ineffective assistance claim is more properly
8 brought through a habeas corpus petition"); see also State v.
9 Wilson, 117 N.M. 11, 18, 868 P.2d 656, 663 (Ct. App. 1993).

10 (14) Similar to our analysis of Defendant's plain error claim,
11 the record is devoid of facts from which we could determine the
12 effectiveness of Defendant's counsel with regard to whether
13 Defendant consented to a search or when a search warrant was
14 required. Defendant argues that the State merely claimed
15 "perfunctorily at trial that [Defendant] consented to the
16 warrantless search of his residence." Our review of the record
17 indicates that the issue regarding consent was simply never
18 raised. We agree with Defendant that the State has the burden
19 to show that the search of Defendant's home fell under an
20 exception to the warrant requirement imposed by the Fourth
21 Amendment. See State v. Mann, 103 N.M. 660, 663, 712 P.2d 6,
22 9 (Ct. App. 1985). However, the State's burden does not arise
23 until Defendant puts facts into issue questioning the validity
24 of the search. Id.

25 (15) Flippo does not require us to conclude that counsel's

1 failure to file a motion to suppress was per se unreasonable as
2 Defendant argues. See Flippo, 528 U.S. at 13. As we
3 previously stated, the defendant in Flippo filed a motion to
4 suppress evidence. Id. Defendant appears to be arguing the
5 merits of a motion to suppress evidence he never made.
6 Instead, Defendant must first point to facts in the record that
7 indicate his counsel's failure to file the motion makes this
8 one of those "rare" cases of prima facie ineffective assistance
9 of counsel. Cf. State v. Baca, 1997-NMSC-059, ¶ 25, 124 N.M.
10 333, 950 P.2d 776.

11 (16) This case is also distinguishable from Patterson, upon
12 which Defendant relies for the proposition that a reasonably
13 competent attorney would not have decided that the motion was
14 unwarranted. In Patterson, the defendant argued that his
15 counsel was ineffective for failing to file a motion to
16 suppress evidence obtained during a "showup" identification.
17 Patterson, 2001-NMSC-013, ¶ 15. Our Supreme Court, in
18 reversing the defendant's conviction, relied on facts contained
19 in the record which supported the motion to suppress. Id. ¶ 26
20 ("It is likely that there was factual support for a motion to
21 suppress the identifications."). The Court stated that the
22 record indicated that the showup identification was highly
23 suggestive and likely "lacked the indicia of reliability
24 necessary to outweigh the suggestiveness of that procedure."
25 Id. The Court went on to state that there were not any facts

1 in the record "which might have led a reasonably competent
2 attorney not to file a motion to suppress." Id. ¶ 27.

3 {17} As we have discussed, the record in this case indicates
4 that Defendant's trial counsel believed Defendant had consented
5 to the entry of police into his home. It also implies that
6 Agent Ortiz was immediately suspicious and at some point
7 realized that a search warrant would be needed. However,
8 except to the extent that Defendant apparently called the
9 police to report the suicide and let them in when they arrived,
10 we cannot determine from the record the extent of Defendant's
11 consent or the time the police needed to obtain a warrant.
12 See, e.g., State v. Duarte, 1996-NMCA-038, ¶ 25, 121 N.M. 553,
13 915 P.2d 309 (stating that a failure to file a non-meritorious
14 motion is not ineffective assistance); State v. Baca, 115 N.M.
15 536, 544, 854 P.2d 363, 371 (Ct. App. 1993) (stating that trial
16 counsel's strategy and tactics will not be second-guessed on
17 appeal).

18 {18} Moreover, even if Defendant could show that his counsel's
19 performance fell below that of a reasonably competent attorney,
20 he has also not shown that his counsel's failure to file the
21 motion prejudiced his defense such that "there was a reasonable
22 probability that the outcome of the trial would have been
23 different." State v. Reyes, 2002-NMSC-024, ¶ 48, 132 N.M. 576,
24 52 P.3d 948. Defendant argues that he was prejudiced because
25 (1) he was not inclined to enter a plea, (2) the evidence was

1 not strong, and (3) "the motion to suppress 'was crucial
2 because it could have excluded key evidence.'" A warrant was
3 obtained to search Defendant's home, and Defendant fails to
4 state with any specificity which evidence, if any, police
5 collected prior to obtaining the warrant. Given this lack of
6 specificity, Defendant's allegation of prejudice amounts to a
7 mere assertion. See In re Ernesto M., Jr., 1996-NMCA-039, ¶
8 10, 121 N.M. 562, 915 P.2d 318 (stating that "[a]n assertion of
9 prejudice is not a showing of prejudice"). We reject
10 Defendant's claim of ineffective assistance of counsel.

11 Hearsay Issue

12 (19) Defendant additionally argues that the trial court erred
13 in allowing Officer Perea to testify to a statement made by the
14 victim. Officer Perea testified that he was dispatched on a
15 domestic violence call to Defendant's residence on October 14,
16 2001, nearly two months prior to the incident at issue.
17 Because it was Defendant's home and Defendant indicated he
18 wanted the victim to leave, Officer Perea escorted the victim
19 off the premises. As she was leaving, the victim stated, "next
20 time you guys see me you're going to find me dead." The State
21 responded to Defendant's hearsay objection by arguing that the
22 statement addressed the victim's state of mind and was allowed
23 under Rule 11-803(C) NMRA.

24 (20) Defendant argues for the first time in his reply brief
25 that we must address the applicability of the United States

1 Supreme Court's recent holding in Crawford v. Washington, 541
2 U.S. 36 (2004), with regard to this issue. Essentially,
3 Defendant argues that the victim's statement to Officer Perea
4 was "testimonial" under Crawford and therefore must be barred
5 because its admission violated Defendant's Sixth Amendment
6 right to "confront and cross examine the witness." However, at
7 trial, Defendant did not base his objection to the testimony on
8 constitutional grounds, but only objected to the testimony at
9 issue on hearsay grounds. The question of whether a defendant
10 was denied the right to confrontation "may not be raised for
11 the first time on appeal." State v. Lucero, 104 N.M. 587, 590-
12 91, 725 P.2d 266, 269-70 (Ct. App. 1986) (refusing to reach
13 confrontation clause issue founded on general hearsay objection
14 and argument that the statement at issue did not fall within
15 any exception to the hearsay rule). An objection raising the
16 question must be "sufficiently specific to alert the trial
17 court to the claimed constitutional errors." Id. at 591, 725
18 P.2d at 270. Like Lucero, Defendant's hearsay objection was
19 too broad to raise a confrontation clause issue. See id. The
20 district court was only required to rule on the objection
21 Defendant made: that the statement was not admissible under
22 the Rule 11-803(C) hearsay exception. See Lucero, 104 N.M. at
23 591, 725 P.2d at 270.

24 (21) As to the issue of whether the district court correctly
25 ruled that the statement was admissible under Rule 11-803(C),

1 we review the admission of hearsay testimony under an exception
2 to the hearsay rule for abuse of discretion. State v.
3 McClagherty, 2003-NMSC-006, ¶ 17, 133 N.M. 459, 64 P.3d 486;
4 State v. Mora, 1997-NMSC-060, ¶ 51, 124 N.M. 346, 950 P.2d 789.
5 A trial court abuses its discretion when its "ruling is clearly
6 against the logic and effect of the facts and circumstances of
7 the case." State v. Simonson, 100 N.M. 297, 301, 669 P.2d
8 1092, 1096 (1983).

9 (22) The State offered the testimony as a hearsay exception
10 under Rule 11-803(C). Rule 11-803(C) states:

11 **Then existing mental, emotional or physical**
12 **condition.** A statement of the declarant's then
13 existing state of mind, emotion, sensation or
14 physical condition (such as intent, plan, motive,
15 design, mental feeling, pain and bodily health), but
16 not including a statement of memory or belief to
17 prove the fact remembered or believed unless it
18 relates to the execution, revocation, identification
19 or terms of declarant's will.

20 (23) Rule 11-803(C) is applicable in situations in which a
21 defendant puts an alleged victim's state of mind at issue by
22 arguing self-defense or suicide. State v. Baca, 120 N.M. 383,
23 389, 902 P.2d 65, 71 (1995); see also State v. Swavola, 114
24 N.M. 472, 478, 840 P.2d 1238, 1244 (Ct. App. 1992) (stating
25 that an utterance by the victim is relevant to the victim's
26 state of mind under Rule 11-803(C) when the defendant argues
27 self-defense and the statement tends to reduce the likelihood
28 that the victim was the initial aggressor). Defendant took
29 such an approach in this case. His statements to police raised

1 issues of suicide, accidental shooting, and self-defense. He
2 requested and received jury instructions for self-defense and
3 second degree murder. The statement "the next time you guys
4 see me you're going to find me dead" was offered to show that
5 the victim feared Defendant and was unlikely to attack him or
6 commit suicide. Yet, due to its ambiguity, the statement
7 arguably helped Defendant as much as it did the State because
8 the jury could have just as easily interpreted the statement to
9 mean the victim intended to commit suicide. Despite its
10 ambiguity, the statement was relevant to the issues of suicide
11 and self-defense, and the court did not abuse its discretion in
12 admitting it.

13 {24} This case is not like Baca. In that case, a young victim
14 had made the statement that she feared her father. Baca, 120
15 N.M. at 389, 902 P.2d at 71. Our Supreme Court held that the
16 statement was not admissible under Rule 11-803(C) because it
17 was not offered to show the victim's state of mind and was
18 therefore irrelevant and prejudicial. Baca, 120 N.M. at 389,
19 902 P.2d at 71. The Court expressed concern that the statement
20 created a substantial risk that the jury could consider the
21 victim's fear as "somehow reflecting on [the] defendant's state
22 of mind rather than the victim's." Id. at 389-90, 902 P.2d at
23 71-72 (internal quotation marks and citation omitted). The
24 defendant in Baca did not raise the issue of self-defense.

25 {25} Defendant, in his reply brief, argues that there is a

1 reasonable probability that he was prejudiced by the statement
2 because the State used it to headline its closing argument.
3 However, we cannot say that the trial court abused its
4 discretion in allowing the statement given the admissibility of
5 the statement under Rule 11-803(C) and the wide latitude
6 afforded prosecutors and defense counsel during closing
7 argument. See State v. Venegas, 96 N.M. 61, 63, 628 P.2d 306,
8 308 (1981).

9 {26} Based on State v. Woodward, 121 N.M. 1, 908 P.2d 231
10 (1995), the dissent would hold that the statement is best
11 construed as the victim's belief that Defendant was going to
12 kill her and is therefore inadmissible hearsay. In Woodward,
13 an appeal of a conviction of first degree murder and other
14 charges, a psychologist testified that the victim had told him
15 that the defendant "is going to kill me." Id. at 8-9, 908 P.2d
16 238-39. Our Supreme Court, relying on United States v. Joe, 8
17 F.3d 1488 (10th Cir. 1993), distinguished a statement that a
18 victim was afraid from a statement that the defendant would
19 kill the victim. Woodward, 121 N.M. at 9, 908 P.2d at 239. It
20 held that the former was admissible as a "statement of then-
21 existing mental, emotional, or physical condition," but that
22 the latter was inadmissible because it was a "statement of
23 memory or belief." Id. (internal quotation marks and citation
24 omitted). However, Defendant did not raise this distinction in
25 the trial court and does not argue it on appeal. We therefore

1 do not address it. See State ex rel. Human Servs. Dep't v.
2 Staples, 98 N.M. 540, 541, 650 P.2d 824, 825 (1982) (stating
3 that appellate courts risk "overlooking important facts or
4 legal considerations when they take it upon themselves to
5 raise, argue, and decide legal questions overlooked by the
6 lawyers who tailor the case to fit within their legal theories"
7 in cautioning this Court against ignoring the arguments
8 presented and searching for alternative grounds for a decision)
9 (internal quotation marks and citation omitted); State v.
10 Ferguson, 111 N.M. 191, 196, 803 P.2d 676, 681 (Ct. App. 1990)
11 ("Courts should not take it upon themselves to raise, argue,
12 and decide legal issues overlooked by the lawyers."). In
13 addition, we note that there was no issue in Woodward as to
14 self-defense or suicide.

15 Agent Ortiz's Opinion Testimony

16 {27} At trial, Agent Ortiz was accepted as an expert in blood
17 stain pattern analysis and crime scene reconstruction without
18 objection. At the beginning of his testimony, Agent Ortiz
19 stated that "Crime Scene Reconstruction is to evaluate the
20 evidence at the scene. Gather physical evidence and you
21 evaluate it to determine to arrive at a conclusion as to what
22 occurred, what happened at the scene." He also testified that
23 blood splatter analysis will "assist you in supporting or
24 refuting any statements by witnesses or defendants." He stated
25 that the evidence did not support Defendant's assertion that

1 the victim walked down the hallway to the bedroom because there
2 were no carpet fibers on the bottom of her bare feet. On the
3 contrary, Agent Ortiz stated that the evidence supported the
4 conclusion that the victim was carried into the bedroom. He
5 also stated that there were pieces of duct tape and potato on
6 the victim, indicating that those substances were covering the
7 barrel of the shotgun. Agent Ortiz was also able to track the
8 trajectory of the flight of the victim's thumb and opined that
9 she was propped up on the bed when she was shot.

10 {28} Agent Ortiz concluded that the victim could not have
11 committed suicide because the lacerations on her hands
12 indicated that they were near the barrel when the shotgun was
13 fired, and therefore, she could not have pulled the trigger.
14 He opined that the covering of the weapon with duct tape and a
15 towel, in addition to the presence of the potato, were all
16 consistent with an effort to prevent gunshot residue from
17 depositing on the person who fired the weapon. He stated that
18 Defendant's claim that the victim committed suicide was not
19 consistent with the physical evidence. Defendant did not
20 object to these statements. Agent Ortiz then gave a synopsis
21 as to the manner in which he believed the crime occurred based
22 on the evidence. Defendant objected and the court asked the
23 prosecutor to "move along." Agent Ortiz opined that Defendant
24 fired the shotgun and used the potato as a silencer and then
25 called the police because of the loud explosion. He stated

1 that "physical evidence does not lie" and that the evidence
2 indicated the victim was killed deliberately.

3 (29) Defendant argues that the trial court erred in overruling
4 his objections to Agent Ortiz's testimony. We review the trial
5 court's admission of Agent Ortiz's testimony for abuse of
6 discretion and we will not disturb its evidentiary ruling
7 absent a clear abuse of that discretion. State v. Stanley,
8 2001-NMSC-037, ¶ 5, 131 N.M. 368, 37 P.3d 85.

9 (30) Defendant relies on Lucero in support of his argument that
10 the trial court erred in admitting the testimony because Agent
11 Ortiz "improperly commented directly on the credibility of
12 [Defendant]." Lucero is distinguishable from this case. The
13 expert witness in Lucero was a psychologist who examined one of
14 the complaining witnesses. Lucero, 116 N.M. at 451, 863 P.2d
15 at 1072. The expert testified that the complaining witness
16 exhibited symptoms of post traumatic stress syndrome caused by
17 sexual abuse. Id. at 451-52, 863 P.2d at 1072-73. The expert
18 also commented directly on the credibility of the complaining
19 witness in stating that the complaining witness was consistent
20 both in identifying the defendant as the abuser and in
21 referring to the rooms in which the alleged abuse occurred.
22 Id. at 452, 863 P.2d at 1073. The expert also inappropriately
23 commented on the demeanor of the complaining witness, which the
24 expert claimed changed when the complaining witness talked
25 about the alleged sexual abuse she had endured. Id. The

1 expert testified that "if the complainant were not telling the
2 truth, she probably would have reacted differently than she
3 did." Id.

4 (31) Our Supreme Court held that the trial court committed
5 plain error in admitting the testimony and stated that an
6 expert commenting on the credibility of the alleged victim of
7 sexual abuse was improper. Id. at 455, 863 P.2d at 1076. The
8 Court, relying on State v. Alberico, 116 N.M. 156, 861 P.2d 192
9 (1993), stated that the expert's testimony was improper because
10 it went outside the bounds of admissible testimony concerning
11 post traumatic stress disorder, which it stated was identical
12 to post traumatic stress syndrome. Lucero, 116 N.M. at 454,
13 863 P.2d at 1075. It reasoned that "[w]hile PTSD testimony may
14 be offered to show that the victim suffers from symptoms that
15 are consistent with sexual abuse, it may not be offered to
16 establish that the alleged victim is telling the truth; that is
17 for the jury to decide." Id. (internal quotation marks and
18 citation omitted).

19 (32) In this case, Agent Ortiz, as a qualified crime scene
20 reconstructionist, gave his opinion as to the credibility of
21 Defendant's version of events. He did not directly bolster the
22 testimony of any of the State's other witnesses. We agree with
23 the State that State v. Landgraf, 1996-NMCA-024, 121 N.M. 445,
24 913 P.2d 252, is directly on point. The defendant in Landgraf
25 had been charged with multiple crimes for causing an automobile

1 crash in which three people died. Id. ¶ 1. The prosecutor
2 offered the testimony of police officers who stated that the
3 defendant's "complex motor reactions demonstrated
4 deliberation." Id. ¶ 20. We stated that the defendant had
5 misconstrued Alberico and acknowledged that our Supreme Court
6 had "recognized and acknowledged the continuing validity of its
7 prior decisions that expert testimony is admissible even if it
8 touches upon an ultimate issue to be decided by the trier of
9 fact." Id. (internal quotation marks and citation omitted).
10 We further stated that the jury is "free to disregard any or
11 all such opinion testimony" and had been so instructed. Id.
12 (33) Agent Ortiz's testimony was similar to that of the police
13 officer in Landgraf. His testimony touched upon the ultimate
14 issue to be decided by the trier of fact, whether Defendant was
15 being truthful in his assertions that the victim committed
16 suicide or attacked him. The jury was instructed that it could
17 entirely disregard the testimony of any or all expert
18 witnesses. Therefore, we cannot characterize the trial court's
19 admission of Officer Ortiz's testimony as "clearly untenable or
20 not justified by reason." See Stanley, 2001-NMSC-037, ¶ 5
21 (internal quotation marks and citation omitted).
22 (34) Defendant additionally asserts that Officer Perea's
23 testimony also inappropriately interpreted the evidence to
24 implicate Defendant. We do not reach this issue because
25 Defendant did not brief it. State v. Desnoyers, 2002-NMSC-031,

¶ 11, 132 N.M. 756, 55 P.3d 968 (stating that issues not argued and supported by authority deemed abandoned). Similarly, Defendant argues that his "constitutional rights to a fair trial and a jury trial under the Sixth Amendment to the U.S. Constitution and Article II, § 14 of the New Mexico Constitution were violated" because of the admission of Agent Ortiz's statements. However, Defendant cites to no authority and also fails to brief the manner in which either constitution was implicated. See Desnoyers, 2002-NMSC-031, ¶ 11. We find no error in the trial court's admission of the testimony.

Prosecutor's Assertions During Opening Statement

(35) Defendant additionally argues that assertions made by the prosecutor during opening statement constitute fundamental error. At the end of his opening statement, the prosecutor asserted:

Just as you have taken an oath and have raised your hand to fairly and truly judge this case, on behalf of the people of the State of New Mexico, I promise you that Ms. Garcia and myself will conduct our case as fairly and as honestly and as truthfully as possible.

(36) Because Defendant did not object to this statement, we only review for fundamental error. State v. Gonzales, 113 N.M. 221, 229, 824 P.2d 1023, 1031 (1992); State v. Diaz, 100 N.M. 210, 212, 668 P.2d 326, 328 (Ct. App. 1983). The doctrine of "fundamental error applies only if there has been a miscarriage of justice, if the question of guilt is so doubtful that it would shock the conscience to permit the conviction to stand,

1 or if substantial justice has not been done." State v. Dartez,
2 1998-NMCA-009, ¶ 21, 124 N.M. 455, 952 P.2d 450 (internal
3 quotation marks and citation omitted). In the context of
4 analyzing a prosecutor's alleged improper statements,
5 "fundamental error arises when the prosecutor engages in
6 misconduct that compromises the defendant's right to a fair
7 trial." State v. Rojo, 1999-NMSC-001, ¶ 55, 126 N.M. 438, 971
8 P.2d 829.

9 {37} Defendant's reliance on Diaz and Baca is also misplaced
10 with regard to this issue. We agree with Defendant that it is
11 improper for a prosecutor to "precondemn a defendant on the
12 basis of the authority he represents." Diaz, 100 N.M. at 213,
13 668 P.2d at 329; Baca, 120 N.M. at 392, 902 P.2d at 75.
14 However, the prosecutor's conduct in this case did not rise to
15 the same odious level as the cases upon which Defendant relies.

16 {38} In Diaz, the prosecutor stated:

17 The taxpayers pay me, pay the judge, even pay
18 Mr. Lane, and they're gonna pay you for being here
19 two days.

20 Please remember ladies and gentlemen, that I
21 represent the State, and just like [the defendant]
22 is represented by Mr. Lane, I represent you and all
23 the other people in the Sixth Judicial District
24 which covers three counties. You are my clients.
25 I'm here to protect your rights. I'm here to
26 protect the security of your homes, your places of
27 business. The people of New Mexico come in here and
28 presented this case to you * * *.

29
30 When you start putting judges on trial, Supreme
31 Court Justices, prosecutors who represent the people
32 * * *.

1 Just remember, the style of this case is State of
2 New Mexico versus [the defendant] * * *. And the
3 people of this district ask you to find him guilty
4 of both counts.

5 Diaz, 100 N.M. at 213, 668 P.2d at 329. In holding that error
6 occurred requiring reversal, we stated that the prosecutor's
7 improper statements were "substantial" and that he had made
8 "overextensive references to the authority he represents." Id.
9 at 213, 215, 668 P.2d at 329, 331. In addition, we stated that
10 it was the combined effects of these comments in addition to
11 the prosecutor's other pronounced and persistent misconduct
12 which likely had "a probable cumulative effect upon the jury
13 which cannot be disregarded as inconsequential." Id. at 215,
14 668 P.2d at 331 (internal quotation marks and citation
15 omitted).

16 (39) In Baca, the prosecutor improperly told the jury that he
17 had a higher ethical duty than defense counsel because he, as
18 a prosecutor, was "bound by law to seek the truth," whereas the
19 defendant's counsel, as a criminal defense attorney, was not.
20 Baca 120 N.M. at 392, 902 P.2d at 74. Our Supreme Court, in
21 reversing the defendant's convictions based on cumulative
22 error, admonished the state to avoid making the same improper
23 statements on remand. Id. However, it did not factor these
24 comments into its cumulative error determination and expressly
25 stated that they did not amount to fundamental error. Id.

26 (40) In this case, the prosecutor did not engage in the
27 extensive and egregious misconduct admonished in Diaz and Baca.

1 He merely stated that he promised to present his case
2 "honestly" and as "truthfully" as possible. While arguably
3 improper, the prosecutor's statements during opening statement
4 were not fundamental error.

5 Prosecutor's Statements During Closing Argument

6 (41) During the State's rebuttal closing argument, the
7 prosecutor personally admonished Defendant, stating that
8 Defendant "continues to disgrace and deface her memory. Shame
9 on you, Gilbert Torres! And I hope you feel my outrage. I
10 hope that as a society" Defense counsel objected, and
11 the trial court told the prosecutor to "tone it down." The
12 prosecutor then stated:

13 And as a society we should feel outraged. We are a
14 nation of law, not of men. The true test of our
15 greatness is how well we treat the least of our
16 citizens. The true test of our greatness is how we
17 uphold the principle that everybody's entitled to
18 life, liberty and the pursuit of happiness.

19 Defendant argues, relying on Diaz, 100 N.M. at 214, 668 P.2d at
20 330, Ferguson, 111 N.M. at 194, 803 P.2d at 679, and State v.
21 Vallejos, 86 N.M. 39, 42, 519 P.2d 135, 138 (Ct. App. 1974),
22 that the trial court erred in overruling Defendant's objection
23 to the prosecutor's statements. We disagree.

24 (42) Because Defendant objected to the statements, we review
25 for abuse of discretion. State v. Clark, 1999-NMSC-035, ¶ 52,
26 128 N.M. 119, 990 P.2d 793. Our Supreme Court has stated:

27 The prosecution is allowed reasonable latitude in
28 closing argument. The district court has wide
29 discretion to control closing argument, and there is

1 no error absent an abuse of discretion or prejudice
2 to defendant. . . . The question on appeal is
3 whether the argument served to deprive defendant of
4 a fair trial.

5 State v. Chamberlain, 112 N.M. 723, 729, 819 P.2d 673, 679
6 (1991) (citations omitted). The defendant in Ferguson objected
7 to the prosecutor's statement of "I think you should return
8 . . . a guilty verdict, for a crime here. Yes." Ferguson, 111
9 N.M. at 195, 803 P.2d at 680. The defendant immediately moved
10 for a mistrial arguing that the words "I think" in reference to
11 the verdict the jury was to give was an improper injection of
12 personal opinion into the case by the prosecutor. Id. In
13 upholding the trial court's grant of the motion for mistrial,
14 we stated that a key component of our reasoning was that the
15 standard of review was deferential to the trial court. Id.
16 (stating that deferring to the trial court in these situations
17 makes sense because "[t]he trial court judge was present, and
18 therefore she was in a better position to resolve this question
19 than we are"). We acknowledged that the trial court could have
20 reasonably decided either way on the issue and therefore
21 affirmed its ruling. Id. at 196, 803 P.2d at 681.

22 (43) In this case, Defendant objected to the prosecutor's
23 statement and the trial court expressed its concern. Defendant
24 did not move for a mistrial or request any curative instruction
25 to the jury. The trial court did not abuse its discretion by
26 not taking further action.

27 (44) This case is also distinguishable from Diaz and Vallejos.

1 In both of those cases, the prosecutors made multiple improper
2 comments, and we based our holdings on cumulative error. Diaz,
3 100 N.M. at 215, 668 P.2d at 331; Vallejos, 86 N.M. at 42, 519
4 P.2d at 138. Moreover, in this case, the State presented
5 evidence that Defendant tried to cover up the incident,
6 repeatedly attempted to portray the victim in a negative light
7 by referring to her drug use, and changed his story at least
8 twice when questioned about the shooting by police. It would
9 not have been an abuse of discretion for the trial court to
10 have ruled that the prosecutor's statements that Defendant
11 continued to disgrace the victim's memory were a fair comment
12 on the evidence. See State v. Lamure, 115 N.M. 61, 67, 846
13 P.2d 1070, 1076 (Ct. App. 1992) ("Comments on the evidence are
14 not error or fundamental error."). Given the facts of this
15 case and our deferential standard of review, the trial court
16 did not abuse its discretion in allowing counsel's statements
17 during closing argument.

18 Cumulative Error

19 {45} Finally, Defendant's claim of cumulative error also fails
20 because the trial court did not commit the many errors
21 Defendant claims were cumulative. State v. Perea, 2001-NMCA-
22 002, ¶ 26, 130 N.M. 46, 16 P.3d 1105.

23 Conclusion

24 {46} For the foregoing reasons, we affirm Defendant's
25 convictions for second degree murder and tampering with

1 evidence.

2 {47} IT IS SO ORDERED.

3

4

5

I CONCUR:


JAMES J. WECHSLER, Judge

6

7


LYNN PICKARD, Judge

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9

MICHAEL E. VIGIL, Judge (concurring in part and dissenting
in part).

1 VIGIL, Judge (concurring in part and dissenting in part).

2 (48) I concur with the majority opinion in all respects except
3 its conclusion that the victim's hear say statement that,
4 "next time you guys see me you're going to find me dead" was
5 admissible under Rule 11-803(C) as a state of mind exception
6 to the hearsay rule. I conclude that the statement was not
7 admissible into evidence under Rule 11-803(C) and that its
8 admission into evidence constituted reversible error.

9 (49) Police Officer Joshua Perea was the second officer to
10 arrive at Defendant's home on December 3, 2001. He was also
11 the State's second witness. Before Officer Perea was asked
12 about the events of December 3, 2001, he testified about an
13 incident which occurred on October 14, 2001, nearly two months
14 before. Officer Perea testified he was back-up on a domestic
15 violence call to Defendant's home involving Defendant and the
16 victim. "[W]e walked into the house and the house was kind of
17 [in] disarray. Looked like a fight had taken place." Officer
18 Perea related that Defendant and the victim had both been
19 drinking and Defendant was stating that he wanted the victim
20 out of the house, that he was tired of her, and did not want
21 a relationship with her anymore. The following then occurred:

22 [PROSECUTOR]: Uh, did you get an opportunity
23 to speak with [victim] that day in October?

24 OFFICER PEREA: I don't recall speaking with
25 her. I was there listening as she was making
26 comments on who did. I know we did give her some
27 uh, information about places that she could stay to

1 get out of there. Anything from a hotel to a
2 domestic shelter.

3 [PROSECUTOR]: And is there anything that she
4 directly said that evening.

5 [DEFENSE COUNSEL]: Objection your Honor,
6 hearsay.

7 [PROSECUTOR]: Goes to victim's state of mind.

8 JUDGE: Overruled, go ahead.

9 [PROSECUTOR]: Okay and can you tell us what
10 was said that evening?

11 OFFICER PEREA: After they were done loading
12 the car with the stuff, we were all getting ready to
13 leave and she was getting off from the couch, just
14 before she got up she made a statement uh, next time
15 you guys see me you're going to find me dead.

16 [PROSECUTOR]: And how did she appear to you
17 that evening?

18 OFFICER PEREA: She seemed kind of groggy, like
19 she wasn't really upset, she wasn't hyperactive like
20 I honestly she may have possibly be[en] under the
21 influence of something, but I wasn't completely
22 sure.

23 [PROSECUTOR]: Do you know if she smelled like
24 alcohol that evening or?

25 OFFICER PEREA: Yes she had been drinking.

26 [PROSECUTOR]: And did you ask anything of her
27 son in response?

28 OFFICER PEREA: Her son was going off I believe
29 the whole time. He made a comment, come on Gilbert
30 tell them how you are threatening to get your hells
31 angels friends to kill my mom or something like
32 that.

33 [DEFENSE COUNSEL]: Judge.

34 JUDGE: Sustained.

1 [DEFENSE COUNSEL]: I and I move that that be
2 stricken and that the jury disregard that statement.

3 JUDGE: It will be stricken and the jury will
4 disregard it.

5 [PROSECUTOR]: Any thing else you did in
6 response to the call in October of 2001?

7 OFFICER PEREA: Just made sure that she left
8 the residence.

9 [PROSECUTOR]: And did Gilbert Torres ask her
10 to leave that night?

11 OFFICER PEREA: Yes.

12 It was in the foregoing context during the State's case in
13 chief before any statements of Defendant were admitted into
14 evidence that the victim's hearsay statement, "next time you
15 guys see me you're going to find me dead" was admitted as
16 substantive evidence.

17 (50) The admission or exclusion of hearsay evidence lies
18 within the discretion of the trial court. State v. Balderama,
19 2004-NMSC-008, ¶ 46, 135 N.M. 329, 88 P.3d 845 ("We review the
20 trial court's admission of hearsay statements for an abuse of
21 discretion."). I conclude that admission of the evidence was
22 erroneous and therefore an abuse of discretion. See State v.
23 Brown, 1998-NMSC-037, ¶ 39, 126 N.M. 338, 969 P.2d 313
24 (stating an abuse of discretion in admitting evidence may
25 occur when its admission is "obviously erroneous." (internal
26 quotation marks and citation omitted)).

(51) The evidence was admitted under Rule 11-803(C), which provides that certain evidence is not excluded by the hearsay rule which includes:

C. Then Existing Mental, Emotional or Physical Condition. A statement of the declarant's then existing state of mind, emotion, sensation or physical condition (such as intent, plan, motive, design, mental feeling, pain and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification or terms of declarant's will.

Id.

(52) This rule allows a declarant's out of court statement of her then-existing state of mind or emotion to be admitted into evidence. However, as the majority agrees, the victim's statement is ambiguous. At best, it is only a declaration ("next time you see me I'll be dead"). In context, the victim might have been asserting to Officer Perea that the next time he saw her she would be dead because Defendant's "hells angels friends" were going to kill her. The statement is not an expression of a state of mind or emotion (such as "I am afraid"). The statement was therefore not admissible. Rule 11-802 NMRA ("Hearsay is not admissible except as provided by these rules or by other rules adopted by the Supreme Court or by statute.").

(53) The hearsay statement was inadmissible for the additional reason that it was irrelevant. "For an extrajudicial statement of a declarant's state of mind to be admissible, the

1 state of mind must be relevant." Baca, 120 N.M. at 389, 902
2 P.2d at 71. The state of mind evidence must prove or negate
3 action or inaction of the declarant that is relevant to the
4 case. While the victim's state of mind may be relevant in
5 issues of "(1) self defense (rebutted by extrajudicial
6 declarations of the victim's passive state of mind), (2)
7 suicide (rebutted by statements inconsistent with a suicidal
8 bent), and (3) accident (rebutted by victim's fear of placing
9 self in way of such harm)." Id. The majority suggests that
10 the victim's statement was relevant because it related to a
11 claim of suicide and self defense. I disagree.

12 (54) The State alleged that Defendant killed the victim with
13 a deliberate intent, and charged him with first degree murder.
14 To prove its case of first degree murder the State introduced
15 two recorded statements Defendant gave to the police.
16 Initially, Defendant contended that he and the victim had
17 argued, victim cut her leg on broken pottery, and she went
18 into the bedroom. Defendant first claimed he heard the
19 shotgun blast come from the bedroom as he sat at his computer.
20 He told the officers about her problems with drugs and the law
21 and claimed she had threatened suicide before. When Defendant
22 was confronted with the physical evidence that was
23 inconsistent with a suicide, and the officers told him they
24 did not believe him, his story changed and he gave a second
25 statement. He now said that while they were arguing the

1 victim pulled the shotgun and she was shot accidentally when
2 he tried to take it away from her. He denied any knowledge of
3 the duct tape, blue towel, or potato, but subsequently
4 admitted he put the towel on the gun trigger, claiming he did
5 so to keep the victim from firing the shotgun. The State
6 introduced these statements into evidence during its case in
7 chief after Officer Perea testified as part of its effort to
8 prove first degree murder. Defendant did not testify.
9 However, Defendant introduced evidence of an incident in which
10 the victim allegedly pulled the shotgun on another person to
11 corroborate the self defense claim his attorney later made in
12 closing argument. Under the circumstances, the victim's
13 statement "next time you see me I'll be dead" did not tend to
14 prove or disprove whether she killed herself. Furthermore,
15 because of its inherent ambiguity, it did not tend to prove or
16 disprove whether the victim attacked defendant two months
17 later, or whether she was accidentally killed. Cf. Swavola,
18 114 N.M. at 478, 840 P.2d at 1244 (stating that the victim's
19 statement that he desired to reconcile with Defendant was
20 relevant where self defense asserted because it reduced the
21 likelihood he was the first aggressor).

22 (55) The statement is most easily construed as a belief by the
23 victim that Defendant was going to kill her. "In general,
24 where state of mind testimony is sought to be used in an
25 attempt to demonstrate the truth of the underlying facts

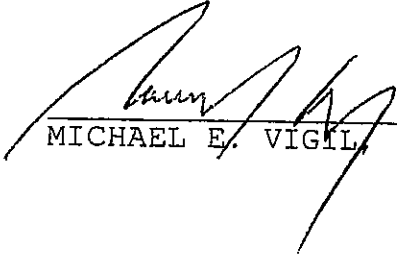
1 rather than solely to show state of mind, the evidence must be
2 excluded." Baca, 120 N.M. at 389, 902 at 72 (quoting United
3 States v. Brown, 490 F.2d 758, 763 n.10 (D.C. Cir. 1973). The
4 rule itself excludes the admission of "a statement of memory
5 or belief to prove the fact remembered or believed." Rule 11-
6 803(C). In Woodward, 121 N.M. at 1, 908 P.2d at 231 the
7 defendant was convicted of killing his estranged wife. Over
8 his objection the victim's statement to a psychologist "[he]
9 is going to kill me" was admitted into evidence. Id. at 8-9;
10 908 P.2d at 238-39. The Supreme Court held this was a
11 "statement of memory or belief" rather than a statement of
12 then-existing mental, emotional, or physical condition, and
13 inadmissible. Id. at 9, 908 P.2d at 239. Woodward explains
14 that while Rule 11-803(C) allows the admission of a
15 declarant's then existing mental or emotional condition, the
16 reason why the declarant has the state of mind is not
17 admissible. The example given by the Supreme Court is from
18 Joe, 8 F.3d at 1492-93, in which the defendant was convicted
19 of killing his estranged wife. Eight days before the murder,
20 she saw a doctor who treated her for rape. During the
21 treatment, she told the doctor she was afraid because the
22 defendant had threatened to kill her. Id. at 1491. Our
23 Supreme Court approved the Joe holding that the first part of
24 the statement that she was afraid was admissible as statement
25 of then-existing mental, emotional, or physical condition but

1 the statement that the defendant would kill her was a
2 prohibited "statement of memory or belief." Id. at 1493;
3 Woodward, 121 N.M. at 9, 908 P.2d at 239. See also Baca, 120
4 N.M. at 389, 902 P.2d at 71 (stating that while Rule 803(C)
5 "allows hearsay statements that show the declarant's then
6 existing mental condition, the rule does not permit evidence
7 explaining why the declarant held a particular state of mind."
8 (citing United States v. Liu, 960 F.2d 449, 452, (5th Cir.
9 1992) (a witness could properly testify that the declarant
10 (the defendant) "was scared" and that he had a fear of getting
11 killed, but not why)).

12 (56) I also conclude that the erroneous admission of the
13 victim's hearsay statement was not harmless error. See State
14 v. McClaugherty, 2003-NMSC-006, ¶ 32, 133 N.M. 459, 64 P.3d
15 486; State v. Morales, 2002-NMCA-052, ¶ 24, 132 N.M. 146, 45
16 P.3d 406. In Baca, the defendant's three-year-old daughter
17 was found with defendant's dead wife. The State presented
18 evidence that the defendant killed his wife then drove his
19 dead wife and daughter to a remote area, where he ran over
20 them. 120 N.M. at 386, 902 P.2d at 68. The daughter saw a
21 social worker who was allowed to testify that the daughter
22 made a nonverbal statement by nodding her head "yes" that she
23 was afraid of her father when he asked her if she was afraid
24 of him. Id. at 387, 902 P.2d at 69. Our Supreme Court held
25 that admission of the hearsay statement was not only improper,

1 but prejudicial, because of the danger that the jury would
2 consider the statement as reflecting on the defendant's state
3 of mind as a true indication of his intentions, actions, or
4 culpability, rather than the victim's. Id. at 389-90, 902
5 P.2d at 71-72. Where there is a strong likelihood that the
6 jury will make such an inference, "injurious prejudice" is
7 "particularly evident." Id. (quoting Brown, 470 F.2d at 766).
8 The prosecutor's opening words in closing argument were:
9 "[Victim's] prophesy came true: 'The next time you see me you
10 are going to find me dead.' She told Officer Josh Perea of
11 the Los Lunas Police Department. And sure enough, the next
12 time Josh Perea saw [Victim], he saw her dead." The
13 prosecutor then highlighted the physical evidence which it
14 argued demonstrated a first degree murder and Defendant's
15 inconsistent statements about what occurred, while referring
16 to the hearsay statement again. The inadmissible evidence was
17 therefore used to demonstrate that Defendant killed the victim
18 and to show his state of mind, not the victim's. This was not
19 harmless error. Baca, 120 N.M. at 390, 902 P.2d at 72
20 (holding that the use of a hearsay statement was an attempt to
21 demonstrate something other than the victim's state of mind
22 and that it was unfairly prejudicial). In light of the
23 foregoing conclusions, I need not address whether, or to what
24 extent, Crawford applies.

1 (57) I would reverse Defendant's conviction and remand for a
2 new trial excluding the victim's hearsay statement. Since the
3 majority disagrees, I dissent.

4
5 
MICHAEL E. VIGIL, Judge